BRIEF ON MERITS

No. 621.

IN THE

Supreme Court of the United States

October Term, 1955.

MARTHA C. REED,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 227 Fed. 2d 810 (C. A. 3, 1955). This is the final judgment of the United States Court of Appeals for the Third Circuit, where judgment was entered for the respondent-defendant affirming the judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing the complaint herein. Chief Judge Biggs dissented.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 17, 1955. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where the undisputed facts reveal that the duties of an office employee of an interstate railroad require her to fill orders from all the shops of its 12-state system by going among files containing 325,000 original tracings of the entire mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage of said system, locating the necessary tracings, delivering them to printmakers for duplication into working blueprints for the shops of the entire system, and thereafter replacing the said tracings in their proper places, is not the Court of Appeals, which is in conflict with this Court, itself, other Courts of Appeals, and state courts of last resort, arbitrarily and capriciously in error in holding that such employee was not within the purview of the Federal Employers' Liability Act, 45 U. S. C. Sec. 51, on grounds that her duties neither further nor directly closely and substantially affect interstate commerce?

2. Is not the Court of Appeals in error in so construing the 1939 Amendment to the Federal Employers' Liability Act, 45 U. S. C. Section 51 [Aug. 11, 1939, c. 685, 53 Stat. 1404], as to differentiate between office workers and employees engaged in actual transportation, and also between the relative importance of employees' positions as affecting transportation?

THE STATUTE INVOLVED.

1. The Federal Employers' Liability Act, 45 U. S. C., § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404], the pertinent portion of which reads as follows:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT OF THE CASE.

On July 15, 1951 while the petitioner, Martha C. Reed, was in the drafting room on the 5th floor of the respondent's 32nd Street Building in Philadelphia, Pa., one of the windows which for a long time had been cracked diagonally from top to bottom blew in upon her, causing her serious personal injuries (30a, 31a).

At the time of the aforesaid accident, the petitioner was employed by the respondent as a "print maker" at the aforesaid building (22a). Her duties consisted of filing original structural tracings of tracks, cars, engines and parts therefor (19a). The department in which the petitioner was employed had approximately 325,000 original tracings on file (20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all other types of structures including bridges and trackage (23a). The respondent's entire system is embraced within the blueprints made from the trac-

ings; that is, its entire physical plant which is found in Pennsylvania, Michigan, New York, New Jersey, Delaware, Maryland, Washington, D. C., Ohio, Indiana, Illinois and Missouri (20a). The 32nd Street Building where petitioner worked is the only place on respondent's entire system where these tracings are kept or where prints are made (14a, 20a).

Approximately 67% of the blueprints are sent by the respondent to shops in states other than Pennsylvania (20a). The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a), and the blueprints go to wherever the respondent runs (47a).

The shops in the respondent's system which are engaged in keeping the system operating send in orders (27a) for blueprints from which they conduct their operations. The petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by going from file to file (23a), locating the necessary tracings and delivering them to the print makers for duplication (28a). It is also her function and responsibility to replace in their proper places the original tracings when they have been duplicated (28a).

The complaint in this case was filed July 23, 1953 (1a). The petitioner's deposition was taken on September 10, 1953 (21a). Almost a year and a half later the respondent moved to dismiss the action on the ground that the petitioner's claim was not within the Federal Employers' Liability Act and there was no other ground for federal jurisdiction (55a, 56a). On March 17, 1955 an Order was entered by Chief Judge Kirkpatrick of the United States District Court for the Eastern District of Pennsylvania, dismissing the action with costs (59a).

On appeal to the United States Court of Appeals for the Third Circuit, judgment was entered for the respondent-defendant upon the unwarranted ground that the Fed-

eral Employers' Liability Act, 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65] as amended by the 1939 Amendment [53 Stat. 1404 (1939), 45 U. S. C. § 51 (1952)] was not broad enough to cover this case.

Chief Judge Biggs of the United States Court of Appeals for the Third Circuit dissented from the decision on grounds that petitioner-plaintiff's duties furthered interstate commerce and as such fell within the purview of the aforesaid 1939 amendment.

SUMMARY OF ARGUMENT.

The 1939 Amendment to the Federal Employees' Liability Act, 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404] effected a coverage over employees of carriers by rail markedly broader than prior legislation. The Amendment indifferently comprehends all places of work and all ranks of personnel in a carrier's system and looks solely to the question of whether any part of a carrier employee's duties furthers interstate commerce or in any way directly or closely and substantially affects such commerce. The question of whether or not any of those relationships to interstate commerce obtain for any given employee's job can be resolved in only one manner: by an inquiry into the functional nature of that job. Neither the importance of the work nor the employee's status in the hierarchy of a carrier's system is relevant to such an inquiry. If the inquiry yields a finding that any one of the relationships to interstate commerce exists, the employee is within the ambit of the 1939 Amendment. If no such relationship is found after a functional analysis, the Amendment is inapplicable.

A functional analysis of the facts at bar leads unambiguously to the conclusion that petitioner's job duties are related to interstate commerce in every mode contemplated by the 1939 Amendment. Since the Amendment can be

invoked if any one of those relationships is found, petitioner unquestionably is an employee covered by the statute.

Notwithstanding the compelling effect of the facts at bar, the Court below held the Amendment inapplicable. The judgment below is patently erroneous, for it rests upon an arbitrary refusal to apply the Amendment as it was meant to be applied. The source of error is grounded in the Court's intrusion into the case of the irrelevancies of job status and job importance, and an unauthorized construction of the Amendment which equates "interstate commerce" with "interstate transportation" and then, in effect, transforms the latter term into the equivalent of "railroading" in its narrowest sense.

The effect of the judgment and majority decision below is not only to bar petitioner from the benefits of vital remedial legislation to which she is clearly entitled, but to confound and distort the application of the Amendment by excising from its coverage great numbers of carrier employees such as petitioner who until now have properly been held to be comprehended by the statute.

ARGUMENT.

Point I.

Petitioner's Duties as Respondent's Employee Were the Furtherance of Interstate Commerce, and They Directly or Closely and Substantially Affected Such Commerce in the Authoritative Sense of Those Terms. She Is Therefore Within the Ambit of 45 U. S. C. § 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].

One of the two major sources of error in the decision of the majority of the Court of Appeals is fundamentally definitional and arises from its barren answer to the crucial question of what is meant by "interstate commerce" as used in the 1939 Amendment to the Federal Employers' Liability Act.

The majority has suggested in footnote 10 of its opinion that interstate commerce under the Act is interstate "transportation" as such, thereby placing itself in direct conflict with *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 601, 34 A. 2d 221 (1943); and *Ericksen v. Southern Pacific Co.*, 234 P. 2d 279 (Cal., 1951). "Indeed", it states, "the interstate commerce involved in railroading is transportation" (at page 812) citing therefor portions of S. Rep. No. 661, 76th Cong., 1st Sess. 2, 3 (1939).[1]

We have exhausted the legislative history of the provision of the 1939 Amendment in issue in this case, and a thorough reading of it reveals how completely useless it is as an aid in resolving the issue at bar. For instance, the very document relied upon by the majority in its footnote 10 as a basis for its holding that commerce is transportation contains material, not mentioned by the majority, which negatives the inference drawn by the majority and

1. 227 F. 2d 810, 811.

supports the construction we urge. S. Rep., No. 661, 76th Cong., 1st Sess. 2, 3 provides, *inter alia:*

> "It is the aim of the bill to amend the Employers' Liability Act in three particulars:
>
> "1. It broadens and clarifies the law in its application to *employees who may be killed or injured while in the service of a railroad company engaged in interstate or foreign commerce.*" (Emphasis supplied.)

So too the majority below, and respondent here, in drawing their conclusion about the scope of the Amendment, quote from and obviously rely heavily upon certain testimony which Mr. T. J. McGrath, General Counsel for the Brotherhood of Railroad Trainmen, gave before the Sub-Committee of the Senate Committee considering the then proposed Amendment.

We are at a total loss to understand why any reliance is to be placed on Mr. McGrath's testimony. First, remarks by those not responsible for the preparation of legislation are not treated as significant expressions of legislative intent: *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 125 (1942); *United States v. United Mine Workers*, 330 U. S. 258, 276-277 (1947); *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 493-494 (1931) and cases cited. Secondly, Mr. McGrath was, in essence, a "special pleader", obviously concerned only with the effect of the Amendment on members of his Brotherhood, and not the effect of the Amendment as a whole. And finally, there is Mr. McGrath's own testimony (unquoted by the majority or respondent) at the same hearings that:

> "I did not draw the amendments and do not know who did. I have not given them close study and deep thought but I infer that it was probably given pretty close scrutiny by someone."[2]

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2. *Hearings before a Subcommittee of the Senate Committee on the Judiciary*, 76th Cong., 1st Sess. on S. 1708, at 76 (1939). This is, of course, the same document cited in the majority opinion's footnote 8.

The quotation from Mr. McGrath's testimony by the majority lends absolutely nothing in answering the question at the very heart of this case: How much did the 1939 Amendment enlarge the coverage of the Act? The answer must lie in areas more authoritative than this kind of completely inconclusive legislative history.

Assuming *pro arguendo* that transportation is the commerce contemplated by Congress in the enactment of the 1939 Amendment, was any part of petitioner's duties, in the language of the Amendment "the furtherance of interstate or foreign commerce (read: transportation); or . . . [did any part] in any way directly or closely and substantially affect such commerce" (read: transportation)?

Having said that the contemplated commerce is transportation, the majority of the Court of Appeals then leaves the matter there. But this, of course, is fruitless tautology since the substitution of one term for another merely begs the question: What is transportation? One looks in vain for the Court's express answer to the question so squarely raised by the substitution of terms.

In all candor, we must ask: is there a difference in the meaning of these terms interstate commerce and transportation?

We urge that a difference there is. It is substantial and the cases in which the terms have been used underscore that difference. In essence it is one of the breadth of concept of the scope of the 1939 Amendment. If the cases are read with a view toward this differentiation it becomes apparent that there are two conflicting views of the effect of the 1939 Amendment.

One view is symbolized by the term "interstate transportation" which has really been used by the majority of the Court of Appeals as a designation of the employee's physical proximity to the classical stuff of railroading: throbbing pistons, the hiss of air in a brake assembly, rattling couplers and rolling stock on flashing rails. Were this view articulated, it would state that to be engaged in

interstate transportation is to be physically near and quite directly in actual contact with the materiel which makes the haul.

If the majority's opinion is read with such a premise in mind, it is very clear that the opinion evolves in a manner totally consistent with that premise. Note, for instance, that "transportation" replaces "commerce" and is then left undefined. What is the purpose of substituting terms if it does not advance the meaning of either of them? But observe that "transportation" has much more the flavor of railroading than "commerce".

In the same mood, the majority raises and then disposes of various examples of employees—the copy writer; printer; typist in the President's office or the clerk who makes out the checks—by stating "Yet all this is a far cry from transportation itself" (at page 811). Is it? How can that be said until the meaning of "transportation" is known? However, a definition is never expressly laid down by the majority. Nonetheless, that parade of carrier personnel could be summarily excluded without difficulty or hesitation from Federal Employers' Liability Act coverage if this truncated view of the 1939 Amendment were adopted. Obviously that has been done. Note that the majority views with alarm the dictionary application of the word "furtherance" for it would "sweep all employees of interstate railroads into the group covered by the statute" (at page 811). Its concern for this result is generated by the set of symbols of the aforementioned group of workers not a single one of whom is begrimed with railroad soot.

The clinching justification for urging this as the majority's unstated premise is its remarkable reversal of the holding of the same Court in *Straub v. Reading Company*, 220 F. 2d 177 (C. A. 3, 1955) a detailed comparative analysis of which appears *infra* under Point II. As we shall indicate the *Straub* case, which also involved a white-collar worker, presented a set of facts considerably more attenu-

ated than those at bar, yet they properly yielded Federal Employers' Liability Act coverage while the present facts are held not to. In its withdrawal from the correct holding of the *Straub* case and the authorities grounding that decision, the majority has created a dissonance which simply cannot be harmonized by asserting that these are *ad hoc* adjudications. In fact, the present decision represents a major shift in the Third Circuit's theory of the scope of the 1939 Amendment.

This view of the 1939 Amendment simply has no foundation. The disposition apparently rests on nothing but *Holl v. Southern Pacific Co.*, 71 F. Supp. 21 (D. C. N. D. Cal. 1947) which is at least subject to the fair observation that it is factually unrelated to this case except that both plaintiffs are office workers. As we indicate in Point II, that fact alone should be immaterial.

Furthermore, the unstated premise which permeates the majority's opinion runs throughout the *Holl* opinion: a view that the 1939 Amendment simply could not encompass the white-collar worker. Note, for instance, the language at page 23 of the *Holl* case:

> "If [plaintiff] comes under the Act, so does the typist to whom she furnished the list of carriers, and the office boy who may have acted as messenger between the two. *And so, for that matter, does every other clerical employee in the department.* I do not think that it was the intention of the Congress to include *such employees* and to withdraw them from the protection of State Employer's Liability Laws." (Emphasis supplied.)

A fair paraphrase of this language is that a clerical employee, *as such*, cannot fall within the 1939 Amendment, for the Court simply excludes "such employees" without so much as qualifying its blanket conclusion with the real contingency that others of "such employees" may have

duties fulfilling either of the disjunctive clauses of the 1939 Amendment. But this contingency simply cannot exist if the "transportation" view of commerce is applied. Indeed, that Court, as the majority here, never has to go into the question of the true nature of the employee's duties.

The *Holl* Court continues at page 23:

> "On the contrary, I am of the view that *had Congress intended to include them, it would have amended the first part of Section 51 by omitting the words 'in such commerce.'* This would have extended the Act to 'any person suffering injury while he is employed by such carrier', and would have placed *all employees of interstate railroads under the Act*, **whether their work be clerical or not,** or in any way connected with the interstate commerce or not. It would have made the sole test *the interstate nature of the business of the carrier.* (Boldface emphasis supplied.)

The boldface emphasis: "whether their work be clerical or not" is, we respectfully submit, a complete confirmation that it is the "workshirt" view of the 1939 Amendment to which the *Holl* Court subscribes. It is clerical work *qua* clerical work which that Court simply cannot subsume in its theory of the Act.

As if this were not proof enough of that Court's unstated premise, observe its catalogue of cases at page 24 of the opinion as to which the Court states at page 24:

> "It is quite evident that each of the employees just mentioned, whether *switchman, brakeman, trackman, repairman, or oilman,* was performing a function connected directly with, or which affected, interstate commerce. Each was doing something in furtherance of interstate commerce, whether he was assisting in the preparation or preservation of *rolling stock, equipment, roadbeds, instrumentalities, accessories or materials* used for repairs. And each was furthering, i.e.,

promoting or helping along, present or future interstate commerce. (First two emphases supplied.)

Without exception, these examples have the full flavor of railroading in the literal, constricted sense of the term.

Note finally the Court's emphasis on the word "promoting" as a synonym for "furthering". This was one of the words (i.e., "promotion") from which the majority of the Court of Appeals fled because it felt that an application of a dictionary term such as this "will sweep all employees of interstate railroads into the group covered by the statute" (at page 811).

We submit that the same erroneous unstated premise which runs through the majority opinion infects the *Holl* opinion as well. Together, these cases conflict markedly with the remedial intent of the 1939 Amendment and indeed with respect to the word "promotion" they are at war with each other.

The gist of the matter is that the "railroader" theory of the 1939 Amendment is wrong. *Ericksen v. Southern Pacific Co.*, 39 Calif. 2d 374, 246 P. 2d 642 (1952), cert. denied 344 U. S. 897 (1952), squarely destroyed it when that Court held at page 645:

> "The defendant contends that the Act does not apply to the plaintiff because he is not a 'railroader' exposed to the risks peculiar to railroading. The Act furnishes a broader definition of those eligible to its benefits. It is made applicable to any employee whose duties further interstate commerce 'or shall in any way directly or closely and substantially' affect such commerce. 45 U. S. C. A. § 51."

The holdings in *Straub v. Reading Co., supra,* and *Lillie v. Thompson*, 332 U. S. 459, 68 S. Ct. 140 (1947) show without doubt that a white collar is no bar to Federal Employers' Liability Act coverage. See also *Bowers v. Wabash Railroad*, 246 S. W. 2d 535 (Mo. App. 1952) and

Thomas v. Union Railway Co., 216 F. 2d 18 (C.A. 6, 1954), 1954 *Workmen's Compensation Law Reports* ¶ 5325. All of these cases were cited in the appeal below, but appear to have had no effect in preventing the majority from indulging this pinched theory of the 1939 Amendment.

In sharp contradistinction to the "interstate transportation" concept is the great weight of authority hewing to the "interstate commerce" theory the essence of which is that coverage under the 1939 Amendment is circumscribed not by a ribbon of rails, but by that totality of carrier employees' work processes which result in the interstate movement of men and goods on those rails.

Unlike the majority's view of the 1939 Amendment, the concept finds nothing inherently difficult about covering the white-collar job under the Amendment since it is not physical proximity to a roadbed but the nature of the work process which sets the limits of coverage. Thus, under this theory of the Act, it is perfectly conceivable and indeed the Act contemplates that a "clerical" worker can have duties which, in the language of the 1939 Amendment, "shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce."

If, as we submit, these are significantly dissimilar and conflicting theories of the scope of the 1939 Amendment, then it is of great importance both to the Third Circuit and courts throughout the nation to determine from more authoritative sources than those suggested by the majority which of these conflicting views is justified by the intent of Congress in its enactment of the 1939 Amendment. (And, of course, so long as the differences are exposed, it ultimately matters not how the views are labeled: commerce equals transportation or commerce equals commerce.)

We respectfully urge that the latter full view of the 1939 Amendment is the only one consonant with Congressional intent. It is now long-settled law that the 1939 Amendment was a great broadening of the FELA, eliminat-

ing as it did the old "moment of injury" test and the "intimate and integral part" of interstate transportation view of the Act. *McFadden v. Pennsylvania R. Co.*, 130 N. J. L. 591, 34 A. 2d 221 (1943); *Southern Pacific Co. v. Industrial Accident Commission*, 19 Cal. 2d 271, 120 P. 2d 880 (1942). The backshop cases[3] can only be explained by this expanded ambit of the statute.

It is now beyond question that the 1939 Amendment effected a marked enlargement of coverage under the FELA. The Court of Appeals for the Third Circuit acknowledged this in *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) at 799-800:

> "There is no doubt that the amendatory language broadened the coverage of the Act. It seems to have done so in *two different ways*. First, the phrase 'any part of whose duties' clearly eliminated the moment of injury test. The new phrase makes the general nature of the employee's duties the controlling factor. If 'any

3. Harris v. Missouri Pac. R. Co., 158 Kan. 679, 149 P. 2d 342 (1944); Trucco v. Erie R. Co., 353 Pa. 320, 45 A. 2d 20 (1946); Jordan v. Baltimore and Ohio Railroad Company, 62 S. E. 2d 806 (1950); Baltimore and Ohio Railroad Company v. Rodeheaver, 81 A. 2d 63 (1951); McGuigan v. S. Pac., 247 P. 2d 415 (1952); Baird, et al. v. New York Central R. R., 86 N. E. 2d 567 (N. Y. 1949); Wills v. Terminal R. R. Ass'n. of St. Louis, 239 Mo. App. 1144, 205 S. E. 2d 942 (St. Louis Court of Appeals, 1947); Pauley v. McCarthy, 166 P. 2d 501 (Utah, 1946); Murphy v. Boston and Maine R. R., 65 N. E. 2d 923 (Illinois, 1946); Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062 (1943); Ermin v. P. R. R., 36 F. Supp. 936, 940 (D. C. E. D. N. Y., 1941); Ernhart v. Elgin J. & E. Ry. Co., 84 N. E. 2d 868, 337 Ill. App. 56 (Ill., 1949); affirmed 92 N. E. 2d 96, 405 Ill. 577; Prader v. P. R. R., 49 N. E. 2d 387 (Ind., 1943); Rainwater v. Chicago, R. I. & P. Ry. Co., 21 So. 2d 872 (La., 1945); Agostino v. P. R. R., 50 F. Supp. 726 (D. C. E. D. N. Y., 1943); Albright v. P. R. R., 37 A. 2d 870 (Md., 1944), cert. den. 323 U. S. 735, 65 S. Ct. 72; Desper v. Starved Rock Ferry Co., 342 U. S. 187, 72 S. Ct. 216 (Ill., 1952); Scarborough v. P. R. R., 154 Pa. Super. 129 (1943); Wright v. New York Central Railroad Co., 33 N. Y. Supp. 2d 531 (N. Y., 1942); Edwards v. Baltimore & Ohio Railroad Co., 131 F. 2d 366 (C. C. A. 7, 1942); Cheffey v. P. R. R., 79 F. Supp. 252 (D. C. E. D. Pa., 1948).

part' of those duties furthers interstate commerce, the employee is covered, even though at the precise moment of injury the specific mechanical task in which he was engaged was purely intrastate. Second, the amendment extended coverage to one not immediately engaged in furthering interstate commerce if his duties in any way closely and substantially affected the furtherance of interstate commerce. The amendment itself is stated disjunctively, that is, it covers an employee if any part of his duties further interstate commerce, *or* if any part of his duties in any way directly, or closely and substantially affect such commerce. If that is the sense of the Act as presently worded, we think the plaintiff here is covered by both tests." (First Emphasis added.)

The Court of Appeals for the Seventh Circuit also recognized the expansion of coverage in *Shelton v. Thomson*, 148 F. 2d 1 (C. A. 7, 1945) at 3:

"There can be no doubt but that the [1939] amendment was intended to broaden the scope of the Act to include employees whose work was related to the functioning of interstate commerce. Concededly the relationship between the encompassed occupations and the actual transportation in interstate commerce has become more tenuous as this law has developed. It was this fact, no doubt, that caused Congress to enlarge the scope of the Act by stating that all employments in '*furtherance* of interstate . . . commerce' are within the Act. The word 'furtherance' is a comprehensive term. Its periphery may be vague, but admittedly it is both large and elastic."

Thus the constriction of coverage effected by the majority of the Court of Appeals in the case at bar is an unauthorized surgery upon the 1939 Amendment which, if permitted to go uncorrected by this Court, will leave a misshapen statute which Congress never intended.

The unwarranted excision appears very clearly in the majority's opinion. It notes, initially, that "the two clauses [in the 1939 Amendment] are in the disjunctive" (at page 811). Many FELA cases, exemplified by *Robinson v. Pennsylvania R. Co., supra,* substantiate that construction.

But the majority thereafter refuses to reason to the conclusion to which those disjunctive phrases lead. Having observed the dictionary definitions of the word "furtherance", the majority will not apply them accordingly for fear "that a literal dictionary application of the word will sweep all employees of interstate railroads into the group covered by the statute" (at page 811). Is there something amiss with such an effect in the light of Chief Judge Biggs' accurately dissenting observation at page 814:

> "As was pointed out by the Superior Court of Pennsylvania, *Scarborough v. Pennsylvania R. Co.*, 1944, 154 Pa. Super. 129, 132, 35 A. 2d 603, 605, the amending language 'is very comprehensive, so inclusive indeed that most railroad employees come within its scope'. Such a result may be unfortunate but seems to have been the intention of Congress."

Beyond this, the former Acting Solicitor General of the United States, Robert L. Stern, Esq., observes in his 1955 Ross Prize Essay, "The Scope of the Phrase Interstate Commerce", 41 A. B. A. L. J. 823, 873 (Sept. 1955):

> "Use of the phrase 'interstate commerce' [in certain other statutes], however, affords no basis for changing the meaning of the constitutional expression. Since such statutes do not exhaust Congress' constitutional authority, Congress has ample power to expand or contract statutory coverage by amendment, without redefining the constitutional phrase. That was what happened to the Federal Employers' Liability Act, which originally applied only to injuries to employees en-

gaged in interstate commerce [citation]. The over-refinements [citation] which resulted from judicial interpretation of that phrase [citation] led to the replacement of the 'in commerce' test by language which covered *all* railroad employees [citation]." (Emphasis supplied.)

Having refused to apply the "furtherance" clause as it was intended, the majority holds that " 'furtherance' was meant to cover those in the actual business of transportation itself and the second clause was to cover the fringes" (at page 812).

We have identified the "transportation" theory for what it really is and find no sound basis either for that view of the scope of the Amendment or the majority's construction that the second clause was the broader of the two because it "was to cover the fringes", for as Chief Judge Biggs properly notes in effect in his dissent, the disjunctives are alternative modes of qualifying for coverage. There is no authoritative reason for holding that one clause is broader than the other.

The majority's reading not only runs afoul of settled authorities, but is grossly inadequate on its own terms. Even if we assume *pro arguendo* that that construction of "commerce" is justified, immediate and fatal difficulties arise. It must follow that if "the actual business of transportation" itself were the limitation of the first clause that the majority says it is, then the "fringes" meant to be covered by the second clause, touch or involve something in addition to, beyond, or other than such transportation. What is it? By what legal standards are injured carrier employee's rights now to be determined under this view of the 1939 Amendment?

If something other than or beyond "the actual business of transportation" is comprehended by the second clause, to what do that clause's words "in any way . . . affect such commerce" refer? Grammatically, what is "such

commerce" if not the alleged "actual business of transportation"?. And yet, logically, this cannot be for the majority has said that the phrase from which it comes is broader than the referent first disjunctive phrase "such commerce".

We earnestly submit that grammatically, logically and historically the interpretation is embarrassing and patently impossible. If it is allowed to stand, it must breed widespread confusion, uncertainty and unnecessary litigation and appeals. The disorder will hobble a set of, until now, clear and effective remedies for the class intended to be covered by the remedial legislation of the 1939 Amendment.

Point II.

A Carrier Employee's Job Function, and Not the Relative Importance of His Work or Status, Is the Sole Determinant of Coverage Under 45 U. S. C. Section 51 [Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404].

(A) The Importance of a Carrier Employee's Job or Its Status in the Hierarchy of the Carrier's System Are Irrelevant.

As indicated *supra*, the opinion of the majority of the Court of Appeals places an erroneous construction upon 45 U. S. C. Section 51. An accurate construction renders the effective coverage of the 1939 Amendment much broader than the majority was willing to recognize thus insuring that carrier employees shall have available to them the remedies Congress intended they have.

As we have argued, the error of the majority arises from unwarranted statutory construction. The other source of error is in an area where two distinct and unrelated sets of inferences can be drawn from the same set of facts in a case such as this; *inferences of job status and inferences of job function.*

The large and legally irrelevant inference used both by the respondent and the majority in the opinion of the Court of Appeals is that petitioner's job is a relatively unimportant one in the hierarchy of railroad affairs, and the majority of Court seems further concerned by the fact that petitioner is an office worker (see its analogizing examples covering only office workers). These are inferences of status and importance and have with utterly no justification been made one of the legal bases for excluding petitioner from the coverage of the 1939 Amendment to the F. E. L. A.

The ensnaring effect of this exercise upon such irrelevancies can readily be seen in an example such as that of an interstate carrier's master train dispatcher who unquestionably falls within the 1939 Amendment. Yet this is how that job would be characterized if the majority's rationale were applied to it:

> "An office worker who, in performing his duties, never leaves the fifth floor of an office building and does nothing more than watch colored lights on a blackboard, use the telephone and put telegrams in a box for future filing."

In his dissent from the Court of Appeals' decision, Chief Judge Biggs fixed upon the error of such reasoning when he stated at page 814:

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also *between the relative importance of employees' positions as affecting transportation.*" (Emphasis supplied.)

In its discussion of the facts of this case, the majority of the Court of Appeals excludes petitioner from coverage under the 1939 Amendment by linking her status with that of "a messenger boy" at the end of a "dire chain of catastrophe" and remarking "One is reminded of the old

rhyme 'for want of a nail the shoe was lost'" (at page 813).

It is petitioner's position that indeed such a chain is involved here as in all such FELA cases, and it is to this that a Court must look in testing for applicability of the 1939 Amendment. But the majority, having been correctly reminded of the adage, summarily abandoned it and proceeded to the bald assertion, resting on no explicitly reasoned grounds whatsoever, that this case is not covered by the Act.

The "chain of catastrophe" in the old rhyme is a chain of functional relationships, and not some Dantean chain of status in which the petitioner-file clerk is placed one position above the messenger boy. The moral of the story is that the battle was lost not because a *private* set off the chain of catastrophe but because the *want of a nail* did. Of what analytical value is the analogy to this case unless it be to the question of the functional relationship of petitioner to interstate commerce? And if that is its intellectual purpose, the fact that the majority of the Court of Appeals abandoned the analysis at the very moment it so productively suggested it is a further indication that a functional analysis was never applied to the facts at bar.

It is our position that the only valid inference to which an inquiry on such facts should be directed is one of *function*. Once the analogy suggested by the majority is posed, there arises the question of petitioner's duties and its answer points clearly to a conclusion of coverage under the Act.

We may designate petitioner a mere file clerk, messenger or by any other job classification. But what in truth are her *duties?* She is indeed engaged in important work which is rendered no less important by the somewhat drab title her job carries. Importance aside (as it should be) the critical fact is that her duties are related to interstate commerce in all those respects comprehended by 45 U. S. C., Section 51.

Petitioner was employed in a department in which approximately 325,000 original tracings were on file (20a). This was the only office in which original tracings were filed (14a, 20a). From the tracings, that department made blueprints of all mechanical equipment, cars, locomotives, cranes and all types of structures, including bridges and trackage (23a). This was the only place in respondent's system in which the blueprints were made (14a, 20a). Respondent's entire system is embraced within the blueprints made from the tracings. The railroad cars depicted by the blueprints are operated over the respondent's entire system (19a, 47a). Blueprints go to wherever respondent runs (47a). It runs through at least twelve states (20a). Approximately 67% of the prints are sent beyond Pennsylvania's state line (20a).

It is clear that the master sheets and the blueprints made from them have a direct connection with, and effect upon, interstate commerce. The railroad's interstate system almost literally runs on those documents. From them the respondent's physical plant has been built. Its tracks, bridges and rolling stock are their end product and unquestionably are kept in operation through their continual use in the construction of new equipment and the repair and replacement of worn and broken gear, equipment, cars, locomotives, trackage, depots, power houses and the like. Without them the respondent could never have gone in operation as an interstate carrier and it could not long continue in the stream of interstate commerce were they destroyed or rendered useless or not subject to constant reference for maintenance and repair.

It is in this context that the petitioner, a "file clerk", works. And what precisely is her function? The shops in respondent's system, which are engaged in keeping the system operating, send in orders (27a) for blue prints from which they conduct their operations. Petitioner, with one other person (30a), fills the orders which come in from the shops (27a, 28a) by running around from file to file

(23a) locating the necessary tracings and delivering them to the printmakers for duplication (28a). It is also her function to replace the original tracings when they have been duplicated (28a).

Thus, it appears that until the tracings are taken out of the dead storage of a file cabinet by someone who knows their location and can get them when they are needed, the tracings are of no use to anyone. It should also be apparent that unless they are accurately replaced in their proper niches, confusion, delay and worse may result when they are needed again by the railroad's shops. Without the tracings the new prints cannot be made. Without the prints new or extra parts cannot be made. Old ones cannot properly be repaired. The system would grind to a halt, a conclusion in no wise vitiated by the majority's characterization of such a cessation as "dismal" (at page 813).

When seen in this perspective, petitioner's title of "file clerk" tells little if any of the full story of her actual role. The work she does is necessary, vital and important. But these qualities, of themselves, do not necessarily bring her within the ambit of the Federal Employers' Liability Act. We must look to see whether these duties, or any part thereof, "shall be the furtherance of interstate commerce; or shall, in any way directly or closely and substantially affect such commerce . . ." as the Act requires.

It is our position based upon the reasoning of this Court in *Overstreet v. North Shore Corporation*, 318 U. S. 125, 63 S. Ct. 494 (1943) that a simple, direct and workable test to determine whether these elements are met here lies in the question: "Are these duties and their due execution a natural step in an interstate commerce operation; would their elimination *affect* or *impede* interstate commerce?" This is but the other side of the 1939 Amendment to the Federal Employers' Liability Act. Eliminate petitioner's function and the answer must be in the affirmative. It does not matter what we call her job. By any title, or no title,

were that function eliminated or improperly performed, the vital tracings would not then get up and walk out of the file drawers in which they repose. And so long as they remain there, the prints duplicated from them would never get to the shops which keep the system operating in interstate commerce. Someone must perform this function, else there would unquestionably be an impediment and delay to the furtherance of interstate commerce and an impediment directly, closely and substantially affecting the furtherance of such commerce. Just as the hostler takes the locomotive from the roundhouse to the running tracks, so petitioner takes the tracings from the files to the maintenance, repair and construction shops and jobs. Hers is a necessary step. She is a necessary cog.

There can be no doubt that a riveter who drills a hole in an engine is covered. The man who carries the rivet is also certainly covered. Can it possibly matter whether he carries a rivet, a blueprint or a tracing? The important thing is that each is performing a function necessary to interstate commerce. Petitioner here was performing work just as necessary to interstate commerce as the man who carrfes the blueprint for the riveter and is, therefore, just as he, covered by the Act.

Note, too, that under this test there can be put to rest the traditional concern of where to draw the Federal Employers' Liability Act coverage line. As indicated, *function* and not the misleading labels of job *status* or *title* should control. It can thus be seen that under this test there *are* railroad employees who would not receive Federal Employers' Liability Act coverage. An office worker, as such, (but another label) may or may not be covered. More must be known of the precise function. Petitioner here is an office worker who, we submit, is clearly within the ambit of the Federal Employers' Liability Act.

A functional analysis of petitioner's duties leads to a most striking conclusion: the truth of the matter is that her job furthers interstate commerce *and* it directly, closely

and substantially affects it. The duties of her job meet *every* test laid down in the 1939 Amendment even though coverage can be invoked if *any one* of the disjunctive provisions is fulfilled.

Once the befogging atmosphere of job status and relative importance is dissipated and the facts are faced this conclusion becomes so self-evident that a contrary position such as that taken by the majority seems inexplicable. It is.

Notwithstanding this argument and the analysis upon which it is based, the majority of the Court of Appeals has stated at page 813:

> "We think it just as well if we do not try to lay down a litmus test which will give a red or blue reaction to all possible sets of fact."

No such test was sought of that Court. Petitioner is well aware that the scope of the 1939 Amendment is not a matter of logarithmic certainty. However, to say this is not to concede what in effect has been laid down by the majority of the Court of Appeals as the basis for adjudication: a necessarily arbitrary *ad hoc* disposition resting on no discernible reasoning except a desire to shrink the limits of 1939 Amendment previously and properly authorized by the very same Court of Appeals, and virtually every other court in the country.

An examination of the majority's opinion reveals this is not an overstatement of the case. The gist of its adjudication on the facts at bar and the precise point at which it generated intra- and inter-circuit conflicts is found at page 813 where the Court said:

> "We think here that we are being asked to apply the act in a situation which would take us further than any case we have seen. We said in *Straub v. Reading Co.*, 3 Cir. 220 F. 2d 177, 183, that we had a 'borderline' case in a matter which involved an assistant chief timekeeper whose responsibility was to see that employees

were properly paid and were not allowed to work more than sixteen consecutive hours. That is closer and more substantial than the plaintiff's connection here."

If we assume the broad and accurate view of the 1939 Amendment, this quoted portion of the opinion is remarkable, for the facts of the *Straub* case actually extend much closer to the limits of the 1939 Amendment than those of the case at bar. If the construction of the 1939 Amendment previously proposed by the majority is assumed, then the *Straub* case is utterly inexplicable. From the present facts, much less attenuated coverage-wise than *Straub*, the same Court has drawn an opposite conclusion stating simply "That is closer and more substantial than the plaintiff's connection here." Why? Surely the mere statement does not make it so.

Straub worked on the sixth floor of the Reading Terminal Building in Philadelphia and was injured there while helping a female employee remove office forms from a high shelf. The ladder which caused the injuries was propped against some filing cabinets at the time of the accident. Although his job took him to several states, the *Straub* court properly held at 183 ". . . but that fact has no bearing on whether his duties furthered or substantially affected interstate commerce."

It is certain that upon an analysis such as that laid down in *Overstreet v. North Shore Corp., supra*, there should be no question that without Straub's functions, the net impact upon interstate commerce would be reflected much more slowly and indirectly than the withdrawal or confusion of petitioner's duties. Straub's duties as assistant timekeeper were "to prevent payroll padding and to ensure appellant's compliance with the Federal Hours of Service Law" (at page 183). Without the execution of such duties, it is perfectly conceivable that there might be no directly appreciable effect on interstate commerce. That is, employees overseen by Straub might neither pad the

payrolls nor work more than sixteen consecutive hours, and even if there were padding and overwork there would still remain the question of what the proximate net effect upon interstate commerce would be. In saying this, we are in no sense questioning the correctness of the *Straub* decision which we respectfully submit was properly decided for reasons we urged upon the Court of Appeals in the argument of that case.

But on the facts at bar, the tracings would not get out of these files unless they were taken therefrom nor would they return unless placed therein. They would not position themselves properly. In a real sense, Straub's duties might be executed by those of his overseen employees who had neither the desire to pad payrolls nor work beyond the designated time. But here no such execution of petitioner's duties by others is possible. Either she prosecutes them or her work does not get done. And if that work is not done the effect is felt directly, immediately and effectively all through the stream of interstate commerce.

What then can be the rationale for the majority's conclusion that Straub's duties are "closer and more substantial than the plaintiff's connection here?" The explanation must lie in Chief Judge Biggs' cogent observation at page 814 that:

> "The majority opinion seems to differentiate between office workers and employees actually engaged in transportation, and also between the relative importance of employees' positions as affecting transportation."

For the reasons stated both in Point I, *supra*, and the discussion herein, neither of these differentiations is justified under the statute. The decision of the majority of the Court of Appeals is a completely erroneous and arbitrary adjudication upon the facts at bar, and is a clearly unauthorized disfigurement of the 1939 Amendment. If not

corrected by this Court it can only confound the application of a statute whose integrity demands decisional uniformity and broad, undiminished scope.

The opinion of the majority represents the latest and most significant attempt to shrink the coverage of the FELA. It thereby strips countless numbers of interstate carrier employees of rights which Congress meant to be secured by the enactment of the 1939 Amendment to the FELA. Until the emasculating decisions of the Court of Appeals and the *Holl* court had been rendered, it was thought that the "transportation" argument had been permanently discredited by cases such as *McFadden v. Pennsylvania R. Co., supra*, and the many backshop cases following it.

Subsequent attempts to chop away at the FELA came in the form of a challenge that the repair was not being made *directly* to an artery of interstate commerce. *Robinson v. Pennsylvania R. Co.*, 214 F. 2d 798 (C. A. 3, 1954) stopped that attempt to impair the effect of the FELA. There followed another effort to narrow the scope of the FELA through the argument that only persons engaged in physical labor were protected by the Act. This, too, failed, *Straub v. Reading Company, supra.*

Once again, the threat of unauthorized statutory surgery is posed by the decision of the Court of Appeals.

With the cases of *Southern Pacific v. Gilco, et al.*, (Docket No. 257) now awaiting argument before this Court, there has finally been raised in this forum the question of the scope of the 1939 Amendment. The facts of those cases embrace backshop workers. The other large area ripe for the consideration of this Court is symbolized by petitioner's job as an office worker. We respectfully submit that like the backshop worker, the office worker such as petitioner is within the coverage of the FELA, for the proper test should indifferently comprehend all places of work in a carrier's system, and all ranks of personnel. It

should look solely to the true nature of the employee's job function.

By granting certiorari in the *Southern Pacific* cases and this case the Court now has before it a full set of cases and comprehensive facts from which the much-needed authoritative construction of the scope of the 1939 Amendment can be roundly drawn. We urge, for all the reasons discussed, that the construction must look to job function and to job function alone in determining whether the statutorily defined relationships to interstate commerce are present.

Such a standard will erase the palpable error of the decision of the United States Court of Appeals in this case, correct confusion both within and without that Circuit and avoid it in future rulings in this vast and important field of law. Not to reverse here will mean an avalanche of cases litigated as to coverage which will crowd our courts with all the uncertainties of the nightmarish pre-1939 days. See the host of pre-1939 cases annotated at 45 U. S. C. A. § 51 [1954 ed.], notes 263, 1116, 1117, 1118.

(B) The Sole Test Is the Relationship Between Job Function and Interstate Commerce.

The test of coverage under the FELA is, and always has been, the interstate character of the employment. The "railroader" theory denies that test and equates coverage with hazard. In brief, the argument is this: the purpose of the Act is to protect those whose duties bring them in close proximity to the intrinsic hazards of railroading. Hence, the engineer, the fireman, the switchman, &c. are covered, but the "office worker" is not. Such a test, of course, disregards the basic criterion of the *interstate* (as opposed to hazardous) nature of the work. Its use runs head-on into a complete inconsistency.

Assume that a locomotive engineer, in the course of his duties, is attending an investigation in respondent's 32nd Street Office Building and that a window breaks because of a known defective condition and injures him. If that engineer is covered,—as he undoubtedly is,—the "hazard" test is obviously totally inappropriate, because he was not injured by any intrinsic railroad hazard.

Now assume that an employee in the blue print office at 32nd Street is on one occasion, directed to take a tracing directly to the foreman in charge of repairing track between 32nd Street and the Philadelphia Suburban Station. While on the tracks, the employee is negligently run over by an engine and killed. In that event the "hazard test" would compel a conclusion of coverage, but this could not be if the majority's view were followed, because the employee is an "office worker", even though the instrumentality of injury was one of those very hazards intrinsic in railroading. Such examples as these could of course be multiplied many times.

It is totally illogical to argue that coverage depends on exposure to hazard, but that nevertheless protection is afforded for many injuries not the result of the hazard, and not afforded for injuries that are the result of the hazard.

CONCLUSION.

Petitioner's duties fell squarely within the scope of the 1939 Amendment to 45 U. S. C., Section 51 in the authoritative sense in which the Amendment has been construed and applied. By affirming the judgment of the District Court dismissing the complaint herein, the Court of Appeals has thus committed serious error which, if uncorrected by this Court; will deprive the petitioner of rights vouchsafed by a solemn act of Congress, ramify into a grave distortion and confusion in the interpretation and application of the FELA in courts across the entire nation, and deprive countless other employees of interstate carriers of the benefits of this remedial legislation.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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